



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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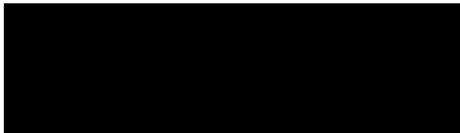
IN RE: Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and the Associate Commissioner for Examinations dismissed the appeal. The petition was reopened on the motion of the Associate Commissioner and the decision to dismiss the appeal was affirmed. The matter is now before the Associate Commissioner on a motion for reconsideration. The motion will be granted. The petition will be denied.

It is noted for the record that the petitioner has a second petition that is pending review before this office. The petitioner has filed a motion requesting that this office reconsider the revocation of approval of an immigrant petition (WAC 94 062 53085) which was revoked by the District Director, Los Angeles, California. The immigrant visa record will be referenced in this proceeding, as counsel for the petitioner has referred to the brief accompanying the other petition and furthermore for the purpose of presenting uniform decisions in both matters.

The petitioner is a California corporation which claims to be engaged in the distribution of sporting goods and the sale of firearms and related accessories. It sought to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that a qualifying relationship existed or that the petitioning enterprise and its purported parent were doing business in the United States and abroad in a regular, systematic, and continuous manner.

On appeal, counsel for the petitioner stated that the petitioner maintains a qualifying relationship with the overseas company, and that the petitioner's parent company is doing business abroad through its subsidiary companies.

The appeal was dismissed by the Associate Commissioner, noting that the petitioner had not submitted sufficient evidence to establish that a qualifying relationship existed between the petitioner and the claimed overseas affiliates. The Associate Commissioner also determined that the petitioner had not established that the claimed overseas affiliates were doing business in a regular, systematic and continuous manner. Finally, the Associate Commissioner observed that, notwithstanding the director's lack of comment in her decision, the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

Regarding the nonimmigrant classification, section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), defines a nonimmigrant intracompany transferee. Furthermore, 8 C.F.R. 214.2(l) provides the regulatory framework for the nonimmigrant intracompany transferee visa petition. As the law and regulations were recited and discussed in the previous

decisions, the legal criteria for this nonimmigrant visa classification will not be cited in full here.

As noted in the previous decision of the Associate Commissioner, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). Where a petitioner seeks an immigration benefit based on a business transaction, the petitioner maintains the burden of establishing the essential elements of that transaction.

The first issue in this proceeding is whether a qualifying relationship exists between the United States company and the claimed parent company.

In the original petition, filed on September 23, 1998, the petitioner asserted that it was the wholly-owned subsidiary of [REDACTED] Inc., a California corporation [REDACTED]. The petitioner further claimed that [REDACTED] was wholly owned by [REDACTED]. See Letter of Mark Foreman, dated September 10, 1998. The petitioner was purportedly doing business overseas through the two claimed subsidiaries of [REDACTED] Corporation [REDACTED], in Taiwan, and [REDACTED] of Malaysia. Regarding the United States operations of the petitioning company, the petitioner claimed that it was engaged in the distribution of sporting goods and the sale of firearms through its subsidiary, [REDACTED]. In support of the claimed relationship, the petitioner submitted a copy of one stock certificate, issued April 25, 1991, demonstrating that [REDACTED]

After the director noted a discrepancy between the petitioner's claimed relationship and the one stock certificate submitted for the record, the petitioner claimed on appeal that there was no discrepancy in the number of shares issued. In response to the director's finding, the petitioner's accountant explained that the apparent incongruity in the number of shares issued was the result of a 1996 merger between [REDACTED] and [REDACTED]. The petitioner's accountant declared the previously submitted stock certificate to be irrelevant. The petitioner also revealed on appeal that [REDACTED] no longer existed, as it was consolidated into the surviving corporation after the merger.

Upon dismissing the appeal, the Associate Commissioner noted that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United

States and foreign entities for purposes of this immigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); see also Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In support of the appeal, the petitioner submitted a copy of stock certificate number three, issued by [REDACTED] International after the merger. It was noted that the one stock certificate, by itself, does not establish the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control.

On motion, the petitioner now acknowledges a discrepancy in the number of shares issued and attempts to clarify the actual ownership structure of the petitioning corporation. In order to establish that a qualifying relationship exists with the claimed overseas parent company, the petitioner explains the series of transactions which led to the claimed relationship between [REDACTED] and the overseas company. The petitioner explains that the merger between the petitioner and [REDACTED] was the ultimate transaction to affect ownership. According to the petitioner's assertion on motion, [REDACTED] had 724,468 shares of capital stock outstanding prior to the merger. The petitioner, on the other hand, had 320,535 shares of stock outstanding. The merger agreement stated that the shares of [REDACTED] would be converted, one for one, into fully-paid and non-assessable shares of stock of the petitioning corporation, [REDACTED]. Accordingly, the total shares of [REDACTED] stock outstanding should amount to 1,045,003. Instead, the petitioner's stock certificate number 3, issued after the merger, as well as the petitioner's tax returns, reflect a total of 1,606,897 shares outstanding.

On motion, the petitioner noted that the 1996 corporate tax return of [REDACTED] reflects capital stock issued in the amount of \$617,283 prior to the merger, while the tax return of [REDACTED] reflects capital stock issued for a total of \$1,925,734. After the merger, the petitioner's corporate tax return reflects a total of \$1,606,897 in capital stock issued. In explaining this discrepancy, the petitioner states:

Obviously these numbers do not correspond to the number of outstanding shares held by each respective corporation. They are, however, reflected as corresponding shares on several documents already filed with the Immigration and Naturalization Service. . . . Subsequent to the merger, the 1996 corporate tax returns of [REDACTED] again reflect capital stock of \$1,606,897, and this number has been erroneously represented as the number of [REDACTED] shares following the merger. This figure is also reflected on [REDACTED]'s stock certificate number 3 which was in fact issued in error, and that

ideally, should have reflected the number of [REDACTED]'s outstanding shares subsequent to the merger, [sic] Thus, although [REDACTED] stock certificate number 3 and Ms. [REDACTED]'s letter represent that the amount shown as capital stock is the actual number of shares issued, this is the result of an oversight and a clerical error.

Prior to this motion, the petitioner's accountant claimed on appeal that "related party accounts between the two corporations were combined as required by tax law, and the stock outstanding was adjusted for these combined amounts resulting in a new ending capital stock balance in the amount of \$1,606,897 for the newly merged [REDACTED]." See Letter of M.A. Miller, dated February 27, 2000, at page 2. The petitioner's accountant also asserted that additional capital was contributed at the time of the merger, thereby explaining that there was no discrepancy in the numbers. The petitioner did not identify the source of the additional capitalization or explain the nature of the "related party accounts" which were combined. On motion, the petitioner appears to have abandoned this claim and leaves the question unresolved. The petitioner now claims that the conflicting numbers are the result of "an oversight and a clerical error."

The petitioner's explanation on motion does not amount to independent objective evidence which would clarify the actual ownership interest of the petitioning corporation. The petitioner relies on claims of "clerical error" to explain the discrepancy in the number of shares issued. The petitioner has not explained the original claim of the petitioner's accountant, namely that there was an additional contribution of capital at the time of the merger and a combination of related party accounts. If there was an additional contribution, the petitioner has not identified the contributor or explained the effect on the ownership structure. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See Matter of Ho, supra at 591.

Regarding the discrepancies noted in the petitioner's IRS Form 5472, the petitioner submits an opinion letter from a tax attorney. As noted in the previous decision of the Associate Commissioner, all United States corporations must disclose whether they have any direct or ultimate indirect foreign shareholder that maintains a twenty-five percent ownership interest in the entity. Internal Revenue Code, 26 U.S.C. §§ 6038A, 6038C (2000). Mr. [REDACTED] writes that the petitioner was not a "reporting corporation" as it did not claim to have any related party transactions with the alleged overseas parent company during the reported tax years. Accordingly, the author concludes that the petitioner was not required to submit a Form 5472. Regardless, Mr. [REDACTED] notes that the petitioner did file Form 5472 with the petitioner's tax returns for

the years 1996, 1997, 1998, and 1999. The petitioner's Form 5472 reports that the claimed overseas parent company, [REDACTED] is an "ultimate indirect 25% shareholder." The attorney confirms that an ultimate indirect shareholder is one which maintains ownership through other indirect 25% foreign shareholders. Regarding the fact that the petitioner reported [REDACTED] as an ultimate indirect foreign shareholder, Mr. [REDACTED] concludes:

[T]he undersigned submits that the erroneous classification of [REDACTED] on Forms 5472 was clearly a mistake, that such an obvious error should have been treated as nothing more than a clerical error, and that if any further evidentiary consideration were to be given to [REDACTED] corporate income tax returns, it is, in my opinion, credible evidence showing [REDACTED] 100% ownership of [REDACTED].

In explaining the grounds for his opinion, Mr. [REDACTED] states that he reviewed the petitioner's corporate income tax returns and the petitioner's claims regarding the ownership structure of the enterprise:

In the present case, you [counsel for the petitioner] have informed me that prior to August 31, 1996, the petitioner [REDACTED] was 100% owned by a U.S. corporation, [REDACTED] Investment Incorporated [REDACTED], which in turn was owned 100% by a foreign corporation. . . .

You have further informed me that on August 31, 1996, [REDACTED] and [REDACTED] merged with [REDACTED] being the surviving corporation pursuant to Section 368 of the Internal Revenue Code.

Mr. [REDACTED] states that his opinion is based on the oral assertions of the petitioner as well as the petitioner's claim that it is 100% owned by [REDACTED]. The author did not base his opinion on a review of the corporate books or an independent audit of the company's claims.

Upon careful review, the opinion letter submitted by Mr. [REDACTED] is not persuasive in explaining or reconciling the inconsistencies in the record. First, it is noted that the letter does not explain why the overseas company was listed as an ultimate indirect owner of the petitioning corporation. In discussing the petitioner's Form 5472, Mr. [REDACTED] merely states that the classification of [REDACTED] as an ultimate indirect shareholder was "an obvious error" and a "mistake." Mr. [REDACTED] does not explain the mistake or provide any independent or objective evidence to clarify how the mistake was made. Furthermore, Mr. [REDACTED] opinion is clearly based on the petitioner's assertion that it is a wholly-owned subsidiary of the overseas company. It is this claim that is subject to scrutiny.

An opinion which is based solely on the petitioner's uncorroborated claim of a qualifying relationship will not amount to "independent objective evidence" and will not suffice to clarify the record. See Matter of Ho, supra.

Furthermore, it was noted in the Associate Commissioner's decision that the director had raised questions regarding the original ownership of the merged parent corporation, [REDACTED]. According to the director, [REDACTED] had been owned in the majority by [REDACTED] and that shares listed in her name were the result of a fraudulent stock transaction that resulted in a private lawsuit. The petitioner did not address this issue on appeal. On motion, counsel for the petitioner asserts that **"the fraudulent transfer of shares was made in connection with [REDACTED], another holding of [REDACTED] and not that involving either [REDACTED] or [REDACTED] International Corporation."** (Emphasis in original!) In support of this claim, counsel directs the Service to the brief filed in support of the beneficiary's immigrant petition and further submits copies of a deposition from 1995. While the petitioner has established that there have been previous claims of fraudulent stock transfers relating to affiliates of the petitioner, counsel's assertions do not address whether there are or have been pending law suits regarding the merger between the petitioner and [REDACTED].¹ As the petition will be denied based on the previously mentioned grounds, this matter will not be discussed further.

Finally, it is noted that the record raises questions regarding the ownership of [REDACTED] International, which the petitioner originally claimed was the subsidiary which conducted the petitioner's business activities in the United States. The record contains a copy of the 1996 IRS Form 1120, U.S. Corporation Income Tax Return, for [REDACTED] International. This form reflects that the two officers of the corporation, the beneficiary and his wife, together own fifty-five percent of [REDACTED] International. The tax return also states that there is no foreign person that owned, directly or indirectly, at least 25 percent of [REDACTED] International. This evidence contradicts the petitioner's claim that [REDACTED]

¹ Despite counsel's claims, a search of the California public records database reveals at least two civil law suits which have been filed in relation to "[REDACTED] Investments Inc." or "[REDACTED] Inv. Ltd." See James R. [REDACTED] v. [REDACTED] Investments, Inc. and Patrick [REDACTED], Case No. R245571 (Municipal Court, Riverside, 1994); [REDACTED] Inv. Ltd. and Mario [REDACTED] v. Coie [REDACTED], Case No. BC141148 (Civil District Court, Los Angeles, 1995). As the nature of these suits are not known and as the petitioner has not been afforded an opportunity to explain, these cases will not be considered in this decision.

International is a wholly-owned subsidiary of [REDACTED] and an ultimate subsidiary of [REDACTED]. Accordingly, the evidence raises the question of whether [REDACTED] International, as the entity that was claimed to be doing business in the United States, maintains a qualifying relationship with the alleged parent company.

Regarding the claimed ownership interest, the petitioner has not resolved the inconsistencies in the record by independent objective evidence. The petitioner has not resolved the inconsistent claims regarding the number of shares outstanding, nor has the petitioner explained the previous assertion that there were related party accounts or an additional capitalization at the time of the merger. Furthermore, the petitioner has not explained the relationship of Asean International. Accordingly, the petitioner's attempts to explain or reconcile these inconsistencies will not suffice, absent competent objective evidence pointing to where the truth, in fact, lies. Id. As the petitioner did not submit sufficient evidence to establish the claimed relationship between the United States employer and the overseas company, and due to the contradictory evidence in the record, the petitioner has not met the burden of establishing that a qualifying relationship exists.

The next issue in this proceeding is whether the petitioner has been doing business in the United States and in at least one other country, through the regular, systematic, and continuous provision of goods or services.

On appeal, counsel asserts that the petitioner is conducting international business through its affiliates in Taiwan and Malaysia. According to counsel, [REDACTED]-Hong Kong is registered in Hong Kong as a multinational corporation which operates as a holding company. Counsel states:

[REDACTED] Investment Limited, by virtue of it being a holding company, never directly conducted manufacturing, trading, investment or banking business. Rather, [REDACTED] Investment Limited (Hong Kong) conducted and continues to conduct, business through [REDACTED] its holding in Malaysia; [REDACTED] its holding in Taiwan; and through the petitioner herein [REDACTED] International Corporation), its holding in the United States.

In the previous decision, the Associate Commissioner found that the petitioner did not submit evidence to establish that the overseas parent company, [REDACTED] maintains office facilities, has a staff to perform the day-to-day operations, or otherwise conducts business in a regular, systematic, and continuous manner. The Associate Commissioner also found that the petitioner had not established that a qualifying relationship exists between the

claimed parent company, [REDACTED] and the claimed subsidiary, [REDACTED], in Taiwan. Finally, the Associate Commissioner determined that the petitioner had not established that a qualifying relationship existed between [REDACTED] and the second claimed subsidiary, [REDACTED] of Malaysia. Specifically, it was determined that [REDACTED] had entered an agreement with the parent company whereby [REDACTED] Bicycle Company had the option to reacquire twenty-one percent of [REDACTED] equity from [REDACTED], once certain conditions were met, thereby restoring majority ownership to the [REDACTED] Bicycle Company. Finally, the Associate Commissioner noted that the petitioner had not submitted sufficient evidence to establish that [REDACTED] was doing business in a regular, systematic, and continuous manner.

On motion, counsel for the petitioner asserts that one of the claimed affiliates, [REDACTED] Corporation of Taiwan, is doing business in a regular, systematic, and continuous manner. The petitioner submitted copies of an order from [REDACTED] to Banker's Trust by which \$481,482 was transferred to [REDACTED] Corporation; a copy of a letter from a law firm confirming the corporate existence of [REDACTED] Corporation; a copy of the minutes from the first shareholder's meeting confirming [REDACTED] owned eighty-six percent of [REDACTED] Corporation; a copy of the articles of incorporation of [REDACTED] Corporation; a copy of the minutes from the shareholder's meeting of March 31, 2000; and copies of sales reports and tax payments from January to June, 2000. In summary, the petitioner has established that [REDACTED] maintains majority ownership of [REDACTED] Corporation and that [REDACTED] Corporation is doing business in a regular, systematic, and continuous manner.

However, the petitioner must establish that it is doing business as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary. As noted previously, the petitioner has not submitted evidence on motion to clarify the relationship between the petitioner and the claimed parent company, [REDACTED]. Accordingly, [REDACTED] may not be deemed to be an affiliate of the petitioner, nor may its business activities be attributed to the petitioner to show that it is doing business in at least one other country other than the United States. It is further noted that the petitioner did not submit any evidence on motion to counter the previous findings of the Associate Commissioner regarding [REDACTED] or [REDACTED], of Malaysia. Finally, the petitioner has not established a qualifying relationship between [REDACTED] International, the company which is claimed to have been doing business in the United States, and [REDACTED]. Accordingly, the petitioner has not satisfied this eligibility requirement.

The final issue in this proceeding is whether the beneficiary would be employed in a managerial or executive capacity as required at 8 C.F.R. 214.2(1)(3)(ii).

In the previous decision of the Associate Commissioner, it was determined that the petitioner had provided a vague and indefinite description of the beneficiary's proposed job duties. The petitioner's description did not disclose the beneficiary's day-to-day activities. Based on the petitioner's description of the proposed job duties, the Service is unable to determine whether the beneficiary is functioning in a primarily managerial or executive capacity, or whether the beneficiary is primarily performing non-managerial, non-executive duties. As 8 CFR 214.2(1)(3)(ii) specifically requires a detailed description of the services to be provided, the evidence submitted was not sufficient to establish that the beneficiary will be employed primarily in a managerial or executive capacity. Furthermore, it was noted that the record established that the beneficiary was one of two employees and that he had been conducting clerical duties, such as placing and receiving orders for firearms and accessories from the company's suppliers.

On motion, counsel for the petitioner claims that the beneficiary is employed in a managerial and executive capacity. Counsel repeats a vague description of the beneficiary's duties, which closely mirror the description which was submitted with the original petition. Counsel also states that there are three employees which perform the "ministerial or clerical" duties of the enterprise. No evidence was submitted to establish the actual duties or job titles of the three claimed subordinate employees. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

In support of these claims, the petitioner submits a copy of a board of director's resolution, whereby the beneficiary, as sole director, appointed himself as chief executive officer of [REDACTED]; a copy of the employee policy manual, which the beneficiary claims to have created; and copies of the petitioner's payroll tax records for a two-week period in September 2000, reflecting a total of four employees, including the beneficiary.

On review, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The petitioner has not revealed the actual day-to-day activities of the beneficiary, nor has the petitioner established the job titles or duties of the claimed subordinate employees. Contrary to 8 CFR 214.2(1)(3)(ii), the petitioner has not submitted a detailed description of the

services to be provided. The petitioner, through counsel, has again provided a vague and indefinite description of the beneficiary's proposed job duties. As proposed by counsel, the duties would include such tasks as "coordinat[e] functions and operations between departments," despite the fact that the petitioner has not submitted evidence of any departmental structure in the small retail operation. Furthermore, regardless of the number of subordinates that are currently employed by the petitioner, the motion does not refute the finding that previously the beneficiary was one of two employees conducting the day-to-day business of the retail firearms store. Finally, the petitioner has not addressed the previous finding that invoices and sales receipts reflect that the beneficiary has been performing the clerical duties of the enterprise, such as placing and receiving orders.. Based on the evidence submitted, the petitioner has not established that the beneficiary has been functioning and will continue to function in a primarily managerial or executive capacity.

For each of the above stated reasons, considered together and as individual grounds for denial, the petition will be denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of August 21, 2000 is affirmed. The petition is denied.